SUPREME COURT OF QUEENSLAND

CITATION:	*R v Carlton* [2018] QCA 294
PARTIES:	**R** **v** **CARLTON, Lawrence Keith** (appellant)
FILE NO/S:	CA No 161 of 2016 SC No 688 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 17 May 2016 (Douglas J)
DELIVERED ON:	30 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2018
JUDGES:	Morrison and Philippides JJA and Bowskill J
ORDER:	**The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of the murder of the deceased, whose death was caused by a large incised wound across the front of his neck, caused by a knife – where it was not in issue that the appellant killed the deceased – where the appellant's case at trial was that he had struck the deceased a blow, as a reaction to being struck by the deceased, not realising that he was still holding a knife that had fallen from the deceased and which the appellant had just picked up – where the issues at the trial were whether the appellant had the requisite intention, to kill or cause grievous bodily harm, at the time of the killing and whether the killing was unlawful, because it was not justified or excused as self-defence, accident or the result of provocation – where there was evidence from a co-offender, who pleaded guilty to being an accessory after the fact and interference with a corpse, of a physical altercation between the appellant and the deceased, but not that he had witnessed the cut to the deceased's throat – where there was evidence from a forensic pathologist who conducted the post-mortem examination that he could not conceive of the injury to the deceased's neck being caused by a punching type mechanism with a knife, as contended by the appellant – whether it was reasonably open to the jury to find

beyond reasonable doubt that the act which caused the deceased's death did not occur in the circumstances contended by the appellant – whether it was reasonably open to the jury to find beyond reasonable doubt that the appellant intended to kill the deceased, or cause him grievous bodily harm, at the time of the act which caused death

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – CONSIDERATION OF SUMMING UP AS A WHOLE – where the appellant contends that two sentences in a lengthy and complex summing up to the jury, and a third sentence in a series of powerpoint slides outlining a possible course of deliberations, erroneously suggested that if the appellant intended to kill the deceased, or cause him grievous bodily harm, he was necessarily guilty of murder, and the defence of self-defence would not apply – whether any basis to conclude that the three isolated sentences could have misled the jury in this way

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant relied upon the operation of s 24 of the *Criminal Code*, in the context of self-defence under s 271(1) and (2) of the *Criminal Code*, on the basis of the appellant's case that he had forgotten he had the knife in his hand, when he struck the blow to the deceased which caused his death – where the appellant contends that the directions to the jury about self-defence did not make it clear to the jury that the onus was on the prosecution to disprove beyond reasonable doubt the operation of s 24 of the *Criminal Code* in relation to self-defence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where there was evidence of conduct by the appellant, after the deceased was killed, including elaborate steps taken to dispose of the deceased's body, which the prosecution relied upon as proof of intention, and as disproving the hypotheses of self-defence, accident and provocation – whether the directions given to the jury as to the use they could make of post-offence conduct were sufficient

Criminal Code (Qld), s 24, s 271, s 668E

Nudd v The Queen (2006) 80 ALJR 614; (2006) 225 ALR 161; [2006] HCA 9, cited
R v Ali [2001] QCA 331, considered
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, considered

R v Beaver (1979) 1 A Crim R 50, cited
R v Box and Martin [2001] QCA 272, cited
R v May [1962] Qd R 456, considered
R v Mitchell [2008] 2 Qd R 142; [2007] QCA 267, considered
R v Murray [2016] QCA 342, considered
R v Reid [2018] QCA 63, considered
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: S Hamlyn-Harris, with B Dighton, for the appellant (pro bono)
D C Boyle for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA**: I agree with the reasons of Bowskill J and the order her Honour proposes.

[2] **PHILIPPIDES JA:** I have had the considerable advantage of reading the reasons of Bowskill J. I agree for the reasons stated by her Honour that the appeal should be dismissed.

[3] **BOWSKILL J:** On 17 May 2016 the appellant was convicted, following a trial, of the murder of Michael Klaassen. He was also convicted, on his plea of guilty, of interfering with the deceased's corpse.

[4] He appeals against the conviction of murder on the grounds that:

(a) in all the circumstances, the jury's verdict is unreasonable or cannot be supported having regard to the evidence (s 668E(1) of the *Criminal Code*);

(b) parts of the directions to the jury erroneously suggested that if the appellant intended to kill Mr Klaassen or to cause him grievous bodily harm, he was necessarily guilty of murder;

(c) the directions did not make it clear to the jury that the onus was on the prosecution to disprove beyond reasonable doubt the operation of s 24 of the *Criminal Code* in relation to self-defence; and

(d) the learned trial judge misdirected the jury on the use they could make of post-offence conduct of the appellant.

Ground 1 – unreasonable verdict

[5] An appeal on this ground requires this Court to perform an independent examination of the whole of the evidence to determine whether it was open to the jury to conclude beyond reasonable doubt that the appellant was guilty of committing the offence. The question is one of fact; not whether there is, as a matter of law, evidence to support the verdict.[1] In performing this task, particular regard must be had to the role of the jury as the constitutional tribunal for deciding issues of fact in a criminal trial, and to the advantage enjoyed by the jury over a court of appeal of seeing and hearing the witnesses called at trial.[2]

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1 *SKA v The Queen* (2011) 243 CLR 400 at [11]-[14], [20]-[22], referring to *M v The Queen* (1994) 181 CLR 487 at 492-493, 494-495; *R v Baden-Clay* (2016) 258 CLR 308 at [66].

2 *R v Baden-Clay* (2016) 258 CLR 308 at [65].

[6] Although this ground was argued on a relatively narrow basis, as will be explained below, it is nevertheless necessary to undertake an examination of the whole of the evidence before the jury in order to deal with it.

The evidence at the trial

[7] At the trial, it was not in dispute that Mr Klaassen was dead and that the appellant killed him. The issues at the trial included whether the appellant had an intention to kill or to do grievous bodily harm, and whether defences of self-defence, provocation or accident applied.

[8] The appellant contended that he had struck Mr Klaassen a blow, as a reaction to being struck by Mr Klaassen, not realising that he was still holding a knife that had fallen from Mr Klaassen and which the appellant had picked up. The appellant argues on this appeal that it was not reasonably open to the jury to find beyond reasonable doubt that the act which caused Mr Klaassen's death did not occur in those circumstances; nor to find beyond reasonable doubt that the appellant intended to kill Mr Klaassen, or cause him grievous bodily harm, at the time of the act which caused his death.

[9] Mr Klaassen was killed on 29 July 2013. He was reported missing by family members in mid-August 2013, following which a police investigation commenced, leading to the appellant.[3]

[10] The appellant did not give or call evidence at the trial. But the evidence included recordings of a number of interviews the appellant had with police, covering a period of about eight hours, in the course of which the appellant's story changed a number of times.[4]

[11] The first interview took place in the early hours of the morning on 13 September 2013, when police went to a property at Chambers Flat Road, Logan Reserve and spoke to the appellant, asking him to accompany them back to the police station. He did so, and was then interviewed at the police station. The appellant told police the last time he saw Mr Klaassen was on a day when he and another person went to a unit at Underwood to help someone called Eddie (the appellant's partner's brother) move his things out. This was said to be Sophie's place (Sophie being Eddie's girlfriend at the time). He said he had not seen Mr Klaassen since, and did not know where Mr Klaassen was now.[5]

[12] The appellant had earlier, on 28 August 2013, provided a sworn statement to police in which he said he had not seen or heard anything of Mr Klaassen since he saw him when moving Eddie out, and said "I don't know what has happened to Mick, but I hope that he is okay and come home for his family's sake".[6]

[13] The appellant was then shown a part of the recording of his partner, Carrie, being interviewed by police. She told police that the appellant had told her he had got into

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3 AR 32-33 (Detective Sergeant Bosgra).

4 The jury were provided with transcripts of the interviews, as an aid to listening to the interviews, and defence counsel accepted it was appropriate for the jury to have access to the transcripts throughout the trial – AR 31, also 346-347. References below are to pages of the transcripts, which were marked for identification, where they appear in the appeal record book.

5 AR 489-490, 502, 508, 511.

6 Exhibit 45, formal admissions, paragraph 10; AR 883. Although paragraph 10 of exhibit 45 refers to 28 August 2015, the correct date must be 28 August 2013, since the statement was given to police prior to the appellant being interviewed by police, which was in September 2013.

an argument with Mr Klaassen and that he (the appellant) had stabbed him and killed him, but would not tell her where Mr Klaassen was. She said he told her to keep her mouth shut and not say anything.[7] He was asked if he wanted to comment on that, but declined.

[14] At this point, he was arrested for the murder of Mr Klaassen.[8] Carrie's statement was then read out to the appellant, in which she said the appellant told her that he and Mr Klaassen got into an argument, and then a knife had dropped out of Mr Klaassen's pocket; the appellant picked up the knife and asked what it was for; Mr Klaassen went off at him, they got into a scuffle, and Mr Klaassen was "gone and no longer here". She said the appellant also told her they (the appellant and the people he was with) put Mr Klaassen's body over a fence and covered him with leaves.[9]

[15] Following that, the appellant was asked if he could tell police where Mr Klaassen is. He said "I can", and "nobody helped me in my efforts or … was involved in it"; that the body "is buried and burnt… out at Logan Reserve"; and that "nobody knew exactly what I have done or how I went about it".[10] He later reiterated that nobody else was involved; that he was "the only one out there with him that night".[11]

[16] The appellant went on to describe how he had felt insulted by something Mr Klaassen had done, in the context of Mr Klaassen moving out of a place they had previously lived together, and that he had challenged Mr Klaassen about that, at which point Mr Klaassen dropped a knife, and the appellant picked it up and asked him what it was, and then noticed he had another knife and "got me on the right finger there", and that "just from a nervous reaction I retaliated with the knife that I had in my person because he dropped it" which "resulted into him receiving a few fatal wounds in that time".[12] He then described how this altercation had occurred after he had asked Mr Klaassen to go for a drive and "sort everything out".[13] He picked Mr Klaassen up from Sophie's place, where it seems Mr Klaassen was staying.[14] The appellant said he was driving and Mr Klaassen was the front passenger.[15] At some point the car pulled over and stopped, at a forest on Ford Road, and when Mr Klaassen got out of the car, the knife fell out and the appellant picked it up and "that's when he turned real hostile against me because I had a knife and, no offence, it fell out of his pocket".[16]

[17] The appellant said he picked up the knife, and that's when Mr Klaassen got him with a second knife and then, out of a "nervous sort of reaction", "I had it [the knife] in my hand then I proceeded to use it. But it was more of a, at first I swung a punch, but I forgot I had that knife in my hand".[17]

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7 AR 525-526.
8 AR 527.
9 AR 531.
10 AR 532.
11 AR 551, 554, 566, 570-571.
12 AR 534-535.
13 AR 536.
14 AR 494, 572.
15 AR 545.
16 AR 535-537.
17 AR 537, 539, 541, 546.

[18] The appellant said Mr Klaassen was then laying on the ground, and he noticed a car come over the hill, and being nervous and not really thinking it through "I dragged him across the driveway and through (sic) him over the fence just so no one has seen something", and "I don't think he was breathing at that stage. And then I dragged him into the bushes".[18] The appellant said he "went back" and talked to his partner and then later on, "I thought he, I couldn't just leave him there. I have to dispose of him so when they were asleep I've collected him, drove him back to their, their property, proceeded to go past the point that they normally ever go and I put him in a hold (sic, hole) and I burnt the hole just so the animals and all that wouldn't eat or smell or anything".[19] The property that he took Mr Klaassen's body to was the property at Chambers Flat Road, where he was apprehended in the early hours of 13 September 2013 (which was where his partner's mother lived).[20] Later in the interview it is explained that this occurred the following night (not the same night as Mr Klaassen was killed).[21]

[19] The appellant described digging the hole to "just under hip level";[22] using paint thinner to start the fire;[23] and then after covering the body and hole, putting chlorine on the surface to "clean the ground";[24] in a later part of the interview saying he used pool acid.[25] He also described how he had wrapped the body in a tarp and duct tape, in order to get it into his boot to drive to the property where he burnt the body.[26]

[20] The appellant told police Mr Klaassen had three other knives "sticky taped to his legs", which he saw when "I dragged him across" and "he ended up lowering his pants".[27]

[21] The appellant told police he had been at "Bell and Paul's" that night, with his partner, Carrie, and her kids, as well as Dave and Eddie. He said he left there, alone, to drive to Sophie's place to take up with Mr Klaassen, telling them he was going to the servo, and then went back there after Mr Klaassen was killed, telling them he went for a drive.[28]

[22] Upon further questioning, the appellant said that a day or two after Mr Klaassen had been killed, he used a pay phone to send a text message to Sophie's phone, purporting to be from Mr Klaassen, saying that Mr Klaassen was on his way to Aspley Acres (caravan park). He said this was as a result of a "scared reaction", because it "started playing on my mind", and when he started thinking "what do I do", "the first thing that come into my mind was just make a text. Like, he was gone… He's gone to Aspley", "thinking, okay, if I do that there won't be a drama with anyone hassling me about was because he said he had warrants with you guys. He was constantly running from you guys…".[29]

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18 AR 539.
19 AR 539.
20 AR 471, 532.
21 AR 592.
22 AR 589.
23 AR 580.
24 AR 590-591.
25 AR 692-695.
26 AR 592-593.
27 AR 543.
28 AR 576-578.
29 AR 574.

[23] As the interview continued, the police read to the appellant part of a statement given by Sophie, who told police that on the night in question the appellant and Eddie came to the door of her unit, and Mr Klaassen left with them. The appellant denied that.[30]

[24] The interview at the police station was suspended at 6.47 am, and then resumed about an hour later as police officers were driving with the appellant, asking him to show them where Mr Klaassen had been killed.[31] He directed the police to the Brisbane Koala Bushlands, and then showed police where he had pulled over with Mr Klaassen, where the altercation took place.[32]

[25] Whilst at that location, the appellant added a new detail, that after he had punched Mr Klaassen (not realising he had a knife in his hand), Mr Klaassen turned and ran, or staggered, then collapsed, face down. The appellant described Mr Klaassen having three wounds at this time – the first, caused by the initial punch, and then two further knife wounds across his throat, which he also said were the result of a "nervous reaction".[33] After Mr Klaassen collapsed, the appellant saw car headlights, got nervous, and dragged his body over to the fence, and tipped him over the fence.[34] He realised he was dead.[35]

[26] In both comments he volunteered, and in response to specific questions, the appellant denied the altercation with Mr Klaassen had anything to do with money, or drugs, and said it was about respect.[36]

[27] The police and the appellant then left that location and travelled to the property on Chambers Flat Road in order for the appellant to show police where the body was.[37] They arrived there at about 9.30 am. The interview commenced again at 10.35 am at that location.

[28] The appellant showed the police where he had dug the hole, and burned the body. He also showed them another fire pit, where he said he had thrown the knives that Mr Klaassen had on him (taped to his legs), including the knife that the appellant had picked up.[38] Two large knives were found in the fire pit.[39] He also threw his own clothes in the fire pit.[40]

[29] The appellant returned to the police station, where a further interview commenced at about 1.30 pm that same afternoon on 13 September 2013.[41] At the beginning of this interview the appellant said there was something he wanted to add to his story, which was that at "the initial event itself" (the night Mr Klaassen was killed) there were three other people present: Edward (Eddie, Carrie's brother), Matt and David; and at the "second event" (burying the body), David was present – but on both

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30 AR 582.
31 AR 56 (DS Bosgra), 604.
32 AR 628-631.
33 See also AR 665-666.
34 AR 631-635.
35 AR 636.
36 AR 620-621 and 652.
37 AR 62 (DS Bosgra).
38 AR 701-703.
39 AR 74 (DS Bosgra).
40 AR 788.
41 AR 72 and 718 (the transcript which was marked for identification has a typographical error as to the date, showing 15 September instead of 13 September).

occasions, those others had no involvement, they were just present,[42] and everything else happened just as the appellant had described earlier.[43] The appellant also said that, on the night Mr Klaassen was killed, they drove in David's car. David and Eddie were in the front; and the appellant, Matt and Mr Klaassen were in the back, with Mr Klaassen sitting in the middle.[44]

[30] Police searches of the Chambers Flat Road property continued, and Mr Klaassen's body was found.

[31] The appellant participated in a further interview with police on 15 September 2013.[45] In the course of this interview, the appellant referred to having received text messages the day or two before (the killing), in which Mr Klaassen threatened to "walk through my house", "with Carrie and kids and didn't mention myself", which he said "in my mind that means that you were entering my premises to cause harm and… [t]hat's, no offence, I'm not going to act tough but that's not going to happen with the kids".[46] He said Mr Klaassen "disrespected my home" and "my purpose to going out there that night was to try and sort it out…".[47] He elaborated to say that Eddie and Mr Klaassen were having an argument, and the text was along the lines of "if you don't make contact I will walk through your house", which meant the appellant's house, which is why he became involved because he is the person "that pretty much keeps that order at home".[48]

[32] The police put to the appellant that, at Bell and Paul's place on the evening in question, there was a fair bit of talk of people being upset with Mr Klaassen, and there was a plan discussed to take Mr Klaassen somewhere and flog him. The appellant said he didn't recall that, and he was only concerned with his own thoughts, not worrying about others, but said it was him that initiated getting into the car and going to see Mr Klaassen.[49]

[33] The appellant said Mr Klaassen got into the car willingly, and that he told the others in the car that he had knives on him, showing the ones on his legs. The appellant said, of the knives, "there was never a surprise".[50] Later in the interview he explained that he realised Mr Klaassen had knives on him, when sitting next to him in the car, because Klaassen lifted his pants leg and showed them.[51]

[34] The appellant said when they arrived at the Koala Bushlands, Mr Klaassen got out of the car (on the side where Matt was); the appellant got out on his side, and walked around the rear of the car to where Mr Klaassen stepped out of the car "and as I he stepped out of the car, that's when the knife has fallen out of yeah, his pocket…", "that is when his knife has hit the ground and I have picked it up".[52]

[35] The police then asked the appellant to describe what happened after that, and he said:

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42 AR 721-722, 725-726.
43 AR 724.
44 AR 722-723.
45 AR 74-75 (DS Bosgra); 746.
46 AR 752-753.
47 AR 753-754.
48 AR 755.
49 AR 758-759.
50 AR 761-764.
51 AR 795.
52 AR 766.

> "Um, now to the stage where I've picked, he's come out and the knife has dropped and the noise has, as I've stated to you guys before, I've got exceptional hearing. That's why it's put my attention to the ground, I've realised there is a knife on the ground so I've picked it up in the same manner that I've stated everyway along my own course of the investigation and then that is where he has taken a hostile, he's not said nothing apart from give me that knife and he has walked straight to my person, that's where I've put my hand on his left shoulder and that is where he has gotten me by surprise and interacted and brought out another knife in question and got me on my right hand side pinky, and that is when I have retaliated in what I thought originally was a punch but obviously it's had a knife involved in it, that I've realised after that point. As I've stated to you before, that I've reacted in a uh second lot of uh, jabbing as you might state on return of my hand …"[53]

[36] Shortly before that, the appellant described how, after the knife hit the ground, and he picked it up [and punched Mr Klaassen]:

> "… he staggered away, be it a little bit fast or, I'm not exactly sure on those parts, because as I said it happened a lot quicker then I expected it and I, I didn't even expect anything like this to happen.
> …
>
> And then when he has resided on to the ground, I don't know if its nerves, I have proceeded to insert the knife a couple of times into the back of his neck and 2 into the side –
>
> SCON FRANCIS: On the ground?
>
> CARLTON: Yes onto the ground."[54]

[37] When asked by police what wounds he believed would be on the body, the appellant said:

> "Okay, we'll have the initial obviously slice of the throat when I've missed my punch, you'll have a couple on the back of the neck, a couple on the side of the neck, and a couple as of 2 and you will I think you might have 2 on the side of him as well um, his right hand side, about rib area."[55]

[38] The appellant then elaborated, "what I left out in our previous questioning before", that [after the initial slash with the knife]:

> "… be it that I'm nervous and I know that at that stage I was starting to realise there was no turning back um, I have proceeded to get him twice behind the neck and 2 obviously in the side of him near his rib cage because nobody needs to die like that.
>
> SCON FRANCIS: So this is after he's already fallen over –
>
> CARLTON: Yes –

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53 AR 768.
54 AR 766-767.
55 AR 772.

SCON FRANCIS: On the ground.

SGT BOSGRA: 2 –

CARLTON: It's more of a pain relief sort of side, but I don't, I don't really care if anyone things I'm a monster by this stage but there is some compassion there.

SGT BOSGRA: So we want to be really clear on that we're saying here Red [the nickname the appellant was said to have been known by], because this is quite important, he's on the ground, he's collapsed.

CARLTON: Yes.

SGT BOSGRA: He's already got 1 blow across the throat.

CARLTON: Yes and 2 on the neck.

SGT BOSGRA: And 2 on the neck?

CARLTON: Yes.

SGT BOSGRA: He's fallen over.

CARLTON: Yes.

SGT BOSGRA: You've then gone to him while he's face down?

CARLTON: Yes.

SGT BOSGRA: You've struck him twice in the back of the neck.

CARLTON: Yes.

SGT BOSGRA: And a couple in the side.

CARLTON: Yes."[56]

[39] When asked further about what he had said about "compassion", the appellant said:

"CARLTON: Oh it wasn't so much compassion it's just I don't know how to state it –

SGT BOSGRA: It, it –

CARLTON: It's basically still a nervous reaction, obviously it's been a very nervous point at that stage, or in any other stage involving this circumstances after the fact, but it's more of a oh I don't know, you wouldn't want to leave somebody bleeding and –

SGT BOSGRA: Yeah.

CARLTON: Obviously the impacts that I have stated are obviously life threatening do you know what I mean?

SGT BOSGRA: Oh the first slash been life threatening?

CARLTON: Yeah and those other 2 returning, like there's –

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56 AR 773-774.

> SGT BOSGRA: Okay –
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> CARLTON: That substantial amount of neck damage like I'm no doctor but everybody knows your wind pipes, everything runs through your neck, so obviously you've done substantial amount of damage there that they would be in pain and they would obviously pass away by those stage."[57]

[40] The appellant then again reiterated that, having felt "an odd sharp sort of pain" on his "pinky", "I've gone for a punch", and "I've put everything into that punch", not realising [he had the knife in his hand].[58]

[41] The formal admissions made at trial included an admission about the examination of the appellant by a forensic medical officer on 13 September 2013, who observed a 2 cm long pink linear scar to his right little finger, which was of "indeterminate age" but "could have been caused in the manner and at the time stated [by the appellant] to police".[59]

[42] There was evidence at the trial of telephone activity between the phones of Carrie, Dave and Sophie on 29 July 2013, including text messages sent from Carrie's phone to both Sophie's and Mr Klaassen's phones, which the appellant acknowledged in the police interviews he had sent.[60] These messages are consistent with what the appellant told police, about Mr Klaassen having said something, which the appellant took offence to, and the appellant then messaging Sophie and Mr Klaassen during 29 July 2013, either trying to speak to Mr Klaassen, or trying to make a plan to come over and "sort it out". The messages include:

> Message sent at 12:22 (to Sophie's phone): "Stop lieing and hiding cause it is starting to piss me off".
>
> Message sent at 13:11 (to Sophie's phone): "Ill be back I heard mick say he will stab me it he come out and dnt top set of flats for help cause my mates no all bout it".

[43] There was also evidence of some photographs, including the appellant and the three other men who had been in the car, posted on Carrie's Facebook on 29 July 2013;[61] and evidence that the photographs were taken after the men came back to "Bell and Paul's place" (that is, after Mr Klaassen had been killed"), in the words of one witness, "to cover up and make out that no-one ever left".[62]

[44] In addition to listening to the appellant's interviews with police, and the evidence of the investigating officer, Detective Sergeant Bosgra, the jury heard evidence from MK, and a number of other lay witnesses.

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57 AR 775.
58 AR 779-780.
59 AR 882, exhibit 45, paragraph 2.
60 AR 77-84 (DS Bosgra); exhibit 15 (phone activity schedule); exhibit 45 (formal admissions), paragraph 9 (AR 883); AR 797-806.
61 AR 96; exhibit 19 (screenshots of Facebook profile and photos) and exhibit 45 (formal admissions), paragraph 8 (AR 883).
62 AR 147 (Craft); see also AR 189, 191 (MK).

[45] MK is the "Matt" who was in the car with the appellant and the others on the night in question. He pleaded guilty to being an accessory after the fact to murder and interference with a corpse.

[46] MK said that on 29 July 2013, or some time before that, he had been told that Mr Klaassen was saying MK and his girlfriend owed Mr Klaassen $2,500. MK and his girlfriend were staying with Bell and Paul at the time. The appellant and Carrie and their children came over to Bell and Paul's place for dinner that night. Also there was Eddie (Carrie's brother), and David (the ex-boyfriend of Carrie) arrived later, to drive them to see Mr Klaassen.[63]

[47] The evidence was that each of these men had an issue with Mr Klaassen. MK said that "Eddie wanted to go talk to [Mr Klaassen] about the relationship that apparently [Mr Klaassen] and Sophie were having while apparently Eddie was still with Sophie"; and "there was also an altercation between Eddie and Mick [Mr Klaassen]". MK said the appellant told him that Mr Klaassen "also made threats to do a run-in on Carrie and the kids while they were asleep", that "he was going to break into the house and slit their throats". MK said that the appellant said he and Eddie were going to go and see Mr Klaassen to sort this stuff out, and asked MK if he wanted to come, and he said he did because he wanted to know why he owed Mr Klaassen $2,500. Then David was called and he came over, and they all got in David's car and drove to see Mr Klaassen. In the car on the way over, David said he also had a problem with Mr Klaassen because he "tried to have a cone in front of his daughter".[64]

[48] MK said they stopped at a service station on the way and while David went in to grab a drink, the appellant handed him a pocketknife. MK said he said "we don't need this", and handed it back to the appellant and that was the last time he saw the knife.[65] After they arrived at Sophie's place, they waited about 30-40 minutes before Mr Klaassen came out and got in the car (with phone calls being made in the meantime, by the appellant, to get Mr Klaassen to come out).[66] Mr Klaassen was in the middle of the back seat, between MK and the appellant. They drove around for half an hour, before ending up at the Koala Bushlands.

[49] MK said that after they left Sophie's place, Eddie and Mr Klaassen got into an argument, and Eddie made threats that he was going to jump in the back seat and start bashing Mr Klaassen. He said that "Red [the appellant] turned around and told him that it's not gonna happen" and things subsequently calmed down.[67] MK confirmed, in cross-examination, that there had been no plan or talk of causing harm to Mr Klaassen, they were just going around there to "sort things out like grown men".[68]

[50] In his evidence in chief, MK described what happened when they stopped there:

> "… So the mood sort of went from being in an angry sort of mood between Eddie and Mick [Mr Klaassen] to sort of calm, having a laugh.

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63 AR 162-165.
64 AR 165-166.
65 AR 167-168.
66 AR 170-171.
67 AR 173-174; 271, 273.
68 AR 271-272.

> Then we pulled up at the park. I got out and I had a smoke beside David's car. Red [the appellant] got out, Mick got out. Red walked up, the gate was locked. Red came back down to the car. Mick walked up, kicked at the gate. One of the knives that he had strapped fell out."[69]

[51] MK went on to explain, consistent with what the appellant had said in his police interview, that Mr Klaassen had told them he had knives on him when he was in the car, as he was arguing with Eddie – according to MK "Mick said that if any shit goes down then he's got four knives strapped to his leg" – and then showed them the knives (two knives, strapped on each of his legs, with brown duct tape).

[52] MK continued:

> "There was four of those ones [knives] strapped to his leg. So when we got to the park, like I said, he kicked the gate and one fell out. He ended up on his ass. Red picked up the knife and said, Mick's got a knife. Red asked if there was any more knives and Mick ran."[70]

[53] MK then said that after Mick [Klaassen] ran, the appellant tackled him, saying "Mick sort of got up, sort of lunged at Red", and then when Red [the appellant] tackled him he went down on the ground:

> "… And then Red was standing there. Mick sort of was up, just – like, a crouching sort of position. Mick tried to go for Red's arm. Red hit him, and then dragged him up where I said Mick's body is. And then all I thought Red was hitting Mick, because that's all it sounded like, was Red was just bashing Mick."[71]

[54] MK did not see if either the appellant or Mr Klaassen had a knife. He later elaborated that "it just looked like Red was laying into him", "bashing", using "just his fists" to "the back of the head". MK said he could hear what "sounded like a fist being hit on bone, but there was like a sort of pop sound to it".[72]

[55] MK was cross-examined by reference to statements he made to police, and things he said to an undercover police officer who was in the watchhouse cell with him. It was put to him that he did not mention anything about the appellant tackling Mr Klaassen, or Mr Klaassen being on the ground and trying to get up and the appellant hitting him. MK maintained that is what occurred.[73] It was also put to MK that he had told police he did not see any punches thrown by the appellant or Mr Klaassen; that he didn't see any wrestling, struggling or fighting;[74] and that he did not make any reference to seeing the appellant doing anything, or hearing sounds like bone-jarring sounds. MK said he had "tried to put that into my statements", and that the police told him they would put those things in his statements.[75] It was put to MK that the police had told him, initially, he was looking at doing 25 years in jail, and that the situation could be different if he was a witness for the police. It was put to him that, in between the recorded conversations, the police were putting to him pieces of information, and asking him if that could be the case. He ultimately

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69 AR 175.
70 AR 176.
71 AR 179.
72 AR 181.
73 AR 281-291.
74 AR 291.
75 AR 293-294.

agreed, at the end of the cross-examination, that he agreed to give back to police the information they had been questioning him about, doing anything he could to get out of the watch house, and that's how his statement had changed – saying "Yes. Somewhat" to that proposition.[76]

[56] In his evidence in chief MK continued:

> "What happened then? --- Then I got called down by Red. As I've come down, I heard – what it sounded like was a bullfrog croaking, like a big loud croak.
>
> Yes? --- I got down to Mick where Red was. Red pretty much stabbed Mick about another three, four times while I was there. I ---
>
> What part of his body? --- In the chest."[77]

[57] MK then assisted the appellant to put Mr Klaassen's body over the fence. He said as they were doing that, there was a light that came on across the road and "[t]hat's where I seen the slit mark on Mick's throat and two puncture marks on Red's – Mick's chest".[78]

[58] MK also said that, in about mid-August he got a phone call from the appellant, saying: "Don't say anything. It's all been sorted. Nothing's going to come back on us. And I've got a kid on the way so don't say nothing".[79]

[59] The jury were given an appropriate warning about MK's evidence, including that it would be dangerous to convict the appellant on the evidence of MK, unless they found that his evidence was supported in a material way by independent evidence implicating the appellant in the offence.[80]

[60] There was evidence from the scenes of crime officer, about the two knives found in the fire pit at the Chambers Flat Road property, which were tendered as exhibits 28 and 29,[81] and other police officers involved in the investigation, as well as a forensic scientist. A police officer who examined the landcruiser car[82] gave evidence of finding a Bunnings receipt, from 30 July 2013, for the purchase of, among other things, a tarpaulin, heat beads and hydrochloric acid.[83]

[61] It is not necessary to refer to the evidence from all the other lay witnesses in any detail. The other witnesses included Darryl Elvery (Carrie's mother's partner). He gave evidence of having helped the appellant to move Eddie's things out of Sophie's unit; and also of a conversation he had with the appellant, about a week after the police first visited his house, making inquiries in relation to Mr Klaassen's disappearance. Mr Elvery gave an account of the appellant describing to him the altercation with Mr Klaassen in similar terms to the account the appellant gave police – that is, that he picked up the knife from the ground, and went to punch Klaassen, forgetting he had the knife in his hand.[84] He said the appellant told him

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76 AR 298.
77 AR 182.
78 AR 183.
79 AR 193-194.
80 AR 370-371 (summing up).
81 AR 195-199.
82 Which belonged to Carrie, and which was said to be the car which the appellant used when he picked up Mr Klaassen's body, from where he had been killed, to take him to the Chambers Flat Road property: see exhibit 1, AR 33-34 (DS Bosgra), AR 304 and 307 (Thompson), AR 539, 592, 735, 738 (appellant's interviews).
83 AR 304-308; exhibit 35.
84 AR 100-101, 103-105.

that on the night in question he and Mr Klaassen were going down to the pub to have a few beers as they had a few things to sort out; he said the appellant told him that Mr Klaassen had threatened to go down to his house, kill the lot of them, and burn their house down; and the appellant wanted to go to the pub to tell him, "keep away from me… you don't touch my property and my possessions".[85]

[62] Evidence was also called from Sophia Fay (the Sophie referred to earlier). She described how she, Eddie (with whom she was then in a relationship) and Mr Klaassen had lived together in her unit at Underwood for a few weeks; and of the appellant helping Eddie to move his things out. She said a day or so later, Eddie and Mr Klaassen were hanging around at her place, and had an argument. She described some phone calls and text messages that were sent, about Eddie wanting to come around and sort out what had happened. Later that night, Eddie, the appellant and another person (Carrie's ex-boyfriend) arrived, and Mr Klaassen went outside and got in the car. She said that when "they said they were coming around half an hour beforehand, he [Klaassen] got nervous and worried, and so he strapped the knifes to his body"; she described him "sticky-taping the knifes to his legs", "at least three or four" knives, steak knives which he got from her kitchen. She described the three men as appearing "agitated", and the appellant as "a bit aggravated".[86] Sophia also gave evidence of receiving a text message from Mr Klaassen a few days after that, saying he was okay and needed to sort some stuff out and was staying at the Aspley Caravan Park.[87] She said that about a week after Mr Klaassen had gone, the appellant and his girlfriend turned up to her unit, asking Sophia if she had heard from or seen Mr Klaassen.[88]

[63] Evidence was also called from Dr Milne, the specialist forensic pathologist who conducted the post-mortem on Mr Klaassen's body on 16 September 2013. Dr Milne identified obvious sharp force injuries (that is, injuries produced by an object such as a knife) to the neck region, shoulder region and the chest. More specifically, he identified a large incised wound (a long cut, from a sharp object being dragged across the surface of the skin, as distinct from a stab wound) right across the front of the neck, exposing the internal soft tissues.[89] The carotid artery and jugular vein on the left side of the neck were cut.[90] He said that would cause a person to bleed quickly and torrentially, and you would expect someone to bleed to death within minutes.[91] There was also a cut through the airway, the junction of the larynx and the trachea. Dr Milne said he thought it was most likely that all of that injury was caused by one application of force.[92]

[64] Dr Milne described this wound as of a "severe extent", "widely across the neck", identifying it as being on the right side, extending from below the ear, across the front of the neck, just below the larynx, to the left side of the neck (although he could not say which direction the knife travelled). Acknowledging that assessment of force is subjective, he expressed the opinion it would have involved moderate force.[93]

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85 AR 106-107.
86 AR 112-116.
87 AR 117.
88 AR 117.
89 AR 201-202; diagram exhibit 30, AR 877.
90 AR 204.
91 AR 205.
92 AR 206.
93 AR 206-207.

[65] Dr Milne also identified a stab wound around the collarbone, and another stab wound on the left shoulder region, neither of which would be likely to endanger life or cause death.[94] On the back of the neck Dr Milne observed 13 horizontal stab wounds clustered together, which he described as superficial and not causing significant injury.[95] He expressed the opinion that the most likely scenario is that the person was unconscious or deceased when these injuries were inflicted, "because, presumably, the body has been stationary for this pattern of injury to be inflicted".[96] There were also two stab wounds on the chest, one on the left which was superficial, and the other on the right which had penetrated into the chest cavity around the lung, although did not injure the lung.[97] Dr Milne also identified an injury to the right lung, around the lower back region, which he considered was most likely caused by another stab wound, but he was not able to identify that due to the damage caused by fire and decomposition. This injury could potentially have been life threatening.[98] All up, there were 19 knife wounds.[99]

[66] Dr Milne certified the cause of death as the incised wound to the neck.[100]

[67] Dr Milne said the incised wound to the neck would be consistent with someone hearing a loud croak coming from the body, which would most likely be the injury to the trachea.[101]

[68] Dr Milne said the wound could have been caused by either of the knives which are exhibits 28 and 29. As to whether the wound would be consistent with someone holding a knife and then going to punch someone, Dr Milne said this:

> "… Now, the injury that you observed, would that be consistent with someone holding a knife, either exhibit 28 or 29, and then going to punch somebody but the knife striking the neck? --- We're talking about a simple forward punching motion?
>
> Yes, or – yes, in the direction of the – it was directed at the jaw? --- I can't really conceive of a scenario where a typical punching mechanism would cause that sort of injury because I think it's much more likely, you know, a forceful application of the blade to the skin because, as I mentioned before, it's got to be quite deep on that left side where the vessels are cut, but also it came across the front of the neck. So a punching type mechanism with a knife would certainly cut the neck, but I can't conceive it causing the injury that is present in this instance."[102]

[69] Dr Milne was cross-examined at some length about this aspect of his evidence. The transcript records defence counsel demonstrating some kind of mechanism of injury, and asking Dr Milne to comment on it. It is not clear from the transcript what that mechanism was (it may be reasonable to infer it was a mechanism

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94 AR 209.
95 AR 210 and exhibit 32, AR 880.
96 AB 211.
97 AR 212 and exhibit 33, AR 881.
98 AR 213.
99 AR 216.
100 AR 216.
101 AR 216.
102 AR 208.

involving holding the knife and punching, but this is not clear).[103] Whilst Dr Milne, in cross-examination, accepted that the internal injury, to the trachea and the jugular and the carotid, could possibly have been caused by that mechanism,[104] in re-examination, he said he did not think the particular injury to the neck which he identified, being the whole injury, occurred by that mechanism.[105]

[70] Dr Milne was then asked further questions, by way of cross-examination, about the possible mechanism (again, not clear from the transcript). It is apparent Dr Milne had considered, and in answering these questions was considering a "punching-type mechanism". Dr Milne's evidence was clear:

> "… I've considered this scenario, and I can't – as I said, I can't conceive a punching-type mechanism…" (for that injury to happen)
>
> "I don't think that injury could occur with that scenario."[106]

[71] When it was put to him the mechanism was something different from that (seemingly more of a "swiping type mechanism" than a punch) he said "I can't totally exclude it"; explaining in further re-examination that although he can't exclude it "I still think it's unlikely, as I said, because of the peculiarities … of the anatomy of the neck and where the deep injuries were".[107]

Was the verdict unreasonable, or not supported by the evidence?

[72] In his written outline on this ground, the appellant submitted that:

> "10. Although the appellant's account to police changed considerably, he was consistent in maintaining that he struck Mr Klaassen a blow as a reaction to being struck by Mr Klaassen, not realising that he was still holding a knife that had fallen from Mr Klaassen and which the appellant had just picked up. <u>There was no other evidence of how Mr Klaassen died to contradict that account</u>. The medical evidence suggested that the neck injury from that blow, rather than any of the later inflicted stab wounds, was the cause of death.
>
> 11. In these circumstances, it is submitted that it was not reasonably open to the jury –
>
> (a) to find beyond reasonable doubt that the act which caused Mr Klaassen's death did not occur in those circumstances; or
>
> (b) to find beyond reasonable doubt that the appellant intended to kill Mr Klaassen, or to cause him grievous bodily harm to him, at the time of the act which caused death."[108]

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103 AR 222.
104 AR 222.
105 AR 230.
106 AR 230-233.
107 AR 233.
108 Underlining added.

[73] In oral submissions at the hearing of the appeal, counsel for the appellant focussed on the evidence of MK, submitting that his evidence was "so unreliable that a jury could not safely use that evidence to effectively reject the appellant's account of how, in effect, Mr Klaassen received his fatal injuries".

[74] Counsel for the appellant accepted that the warning given by the learned trial judge to the jury about MK's evidence was appropriate; and that, acknowledging the discrepancies in MK's evidence, as between what he said at the trial and what he had previously told the police in various interviews and statements, it was a matter for the jury what they made of MK's evidence. But on any version, MK did not see, and did not say that he had seen, the moment of the cut to Mr Klaassen's throat.

[75] Significantly, though, the evidence of Dr Milne was independent evidence which both supported aspects of MK's evidence (as to the additional stab wounds to the chest; and also as to the relevance of the "croaking" sound MK said he heard) and which the jury could reasonably have relied upon to reject the appellant's contention – of an accidental punch, not realising he was holding a knife. Of that type of mechanism of injury, Dr Milne said he "could not conceive" of the serious injury to the neck being caused in that way. Even if the jury had entirely rejected MK's account, Dr Milne's evidence was persuasive and plainly contradicted the appellant's contention.

[76] Neither the argument in [10] of the appellant's written argument, nor the additional oral argument concerning MK's evidence, support a conclusion that the verdict was unreasonable or unsatisfactory. Further, and in any event, having considered the whole of the evidence before the jury, I consider it was plainly open to the jury to conclude beyond reasonable doubt that the appellant was guilty of murder.

[77] Mr Klaassen's death was caused by a significant cut to his throat with a knife, inflicted by the appellant. The forensic pathologist's evidence was that he could not conceive of that injury being caused by a punch whilst holding a knife, as the appellant contended. In addition to that fatal injury, the appellant inflicted another 18 stab wounds on Mr Klaassen, some, on his own admission, whilst he was on the ground, unable to move. Although the appellant described this to police as an action of compassion, it would not have been difficult for the jury to reject that in the circumstances. The evolving story weaved by the appellant in the course of his police interviews lacked credibility, both intrinsically and as a result of its evolution. There was evidence of motive. It was open to the jury to find that the subsequent conduct of the appellant, hiding the body, and then taking it to another property and disposing of it in the way that he did, and his lies to police, went beyond what was likely to have been engendered by a consciousness of having unintentionally killed Mr Klaassen.

[78] In my view, the jury's verdict was both reasonable and supported by the evidence. Ground 1 fails.

Ground 2 – that parts of the directions to the jury erroneously suggested that if the appellant intended to kill Mr Klaassen or to cause him grievous bodily harm, he was necessarily guilty of murder

[79] For ground 2, the appellant has isolated the following sentences (underlined) from what was a lengthy and comprehensive summing up to the jury:

(a) "Murder is an unlawful killing which occurs in the circumstances I've just described [by reference to the definition of murder in the *Criminal Code*], so that for the purposes of this case, you should understand that the accused, Mr Carlton, is guilty of murder if he caused the death of Mr Klaassen and if he intended to kill him or to cause him grievous bodily harm. In what I have just said, there were some matters that may need explanation…"[109]; and

(b) "On the evidence you may decide that Mr Carlton stabbed the deceased in the throat in the course of a confrontation between them outside the koala park and that Mr Klaassen died on the spot. If you are satisfied beyond reasonable doubt that, when he stabbed Mr Klaassen, Mr Carlton intended to cause his death or do him grievous bodily harm, then you may find Mr Carlton guilty of murdering Mr Klaassen. For that purpose, the question is not whether Mr Carlton meant to punch Mr Klaassen – you may think he certainly did – but whether, in punching him, he intended to kill him."[110]

[80] And the following sentence (underlined), at the commencement of nine pages of powerpoint slides, setting out a possible course of deliberations:

> "If you are satisfied beyond reasonable doubt that the defendant intended to kill or to do grievous bodily harm when he struck the deceased in the throat with the knife you should find the defendant guilty of murder.
>
> Before you reach a conclusion on that issue you will need to consider:
>
> - Whether the prosecution has disproved the available defences beyond a reasonable doubt; and
> - Whether the defendant has established on the balance of probabilities that he was provoked into attacking the deceased."[111]

[81] In his written submissions, the appellant submits that "these directions are very specific, and there was a real risk that they may have misled the jury into thinking that the defences of self-defence under section 271(2) and provocation under section 304 did not apply if there was an intention to kill or to do grievous bodily harm."[112] In the oral submissions, however, it was acknowledged that the learned trial judge gave "very clear directions" in relation to provocation, and that the real complaint was about self-defence under s 271(2).[113]

[82] The directions to the jury in the summing up must be considered as a whole.[114] It is artificial to isolate sentences such as these and contend that, of themselves, they "may have misled the jury into concluding that that was an overriding principle or an overriding point of law on which they could convict".[115]

[83] The passage at paragraph [79](a) above appears at the point in the summing up when the learned trial judge has finished giving the usual introductory directions

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109 AR 375.
110 AR 382-383.
111 AR 855.
112 Paragraph 13 of the appellant's written submissions.
113 T 1-17.
114 *R v Beaver* (1979) 1 A Crim R 50 at 53.
115 Appellant's oral submissions at T 1-13.

about assessing evidence, and turns to deal with the elements of the offence charged. The learned trial judge explained that before the appellant could be found guilty of murder the jury needed to be satisfied beyond reasonable doubt of four things: (1) that Mr Klaassen was dead (which was not disputed); (2) that the appellant killed him (which was not disputed); (3) that he did so intending to cause his death, or at least to cause him grievous bodily harm (which the judge said was an issue the jury needed to consider); and (4) that the killing was unlawful (which the judge said "again, raises issues you have to consider").[116]

[84] After referring to the definition of "murder", and saying what appears at [79](a) above, the judge gave a direction about intention (which is elaborated on later in the summing up), and the meaning of grievous bodily harm, and then said:

> "There's no doubt about the time and place of death charged in the indictment. Subject to the issues of self defence, accident – and in that context, criminal negligence – lack of intention and provocation, which I have mentioned, there is no question here about the unlawfulness or the cause of Mr Klaassen's death, but those are the issues going to the question of lawfulness. Let me, then, say something more about those issues."[117]

[85] The learned trial judge then gave directions about self-defence, including in relation to s 271(1) and (2), and the effect of mistake.[118] At the start of the directions about self-defence his Honour explained that:

> "If the Prosecution cannot, to your satisfaction, beyond reasonable doubt exclude the possibility that Mr Klaassen's injuries occurred in self defence as the law defines it, <u>that is the end of the case</u>. <u>The defendant's use of force would be lawful and you should find him not guilty</u>".[119]

[86] After lengthy directions about self-defence under both s 271(1) and s 271(2), his Honour then dealt with accident, explaining that the evidence that raised the possibility of this defence was the appellant's statement to police that he punched Mr Klaassen, forgetting that he had a knife in his hand.[120] It was in that context that the learned trial judge said the following, which puts in context the second sentence complained about:

> "If the defendant did not intend or foresee the death, serious injury or bodily harm of Mr Klaassen as a possible consequence of his actions of hitting him with what he thought was only his fist, and if an ordinary person in the position of the defendant would not have foreseen that as a possible consequence of those actions, then the defendant would be excused by law and you would have to find him not guilty.
>
> It's not for the defendant to prove anything. Unless the Prosecution proves beyond reasonable doubt that an ordinary person in the position of the defendant would reasonably have foreseen the death,

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116 AR 374-375.
117 AR 375.
118 AR 376-381.
119 AR 376. Underlining added.
120 AR 381-383.

> serious injury or bodily harm of Mr Klaassen as a possible consequence of his actions and that the defendant intended or foresaw that, you must find him not guilty.
>
> Even if you reject the defendant's account of what happened, you must consider the possibility that the event occurred unforeseen and unintended. The defendant is under no obligation to prove any matters. And before you can convict him, you must be satisfied by the Prosecution beyond reasonable doubt both that the death, serious injury or bodily harm was an event which the defendant intended, or foresaw as a possible consequence, and that an ordinary person in the defendant's position would reasonably have foreseen it.
>
> On the evidence you may decide that Mr Carlton stabbed the deceased in the throat in the course of a confrontation between them outside the koala park and that Mr Klaassen died on the spot. <u>If you are satisfied beyond reasonable doubt that, when he stabbed Mr Klaassen, Mr Carlton intended to cause his death or do him grievous bodily harm, then you may find Mr Carlton guilty of murdering Mr Klaassen</u>. For that purpose, the question is not whether Mr Carlton meant to punch Mr Klaassen – you may think he certainly did – but whether, in punching him, he intended to kill him."[121]

[87] The learned trial judge then addressed the alternative of manslaughter, including because of criminal negligence;[122] gave further directions about intention, including reminding the jury of earlier directions given about how they could use the evidence of subsequent conduct;[123] and then addressed the defence of provocation.[124]

[88] After summarising the evidence at some length,[125] and summarising the prosecution and defence arguments,[126] the learned trial judge provided the jury with a possible way of approaching their deliberations, which he commenced by saying this:

> "If you are satisfied beyond reasonable doubt that the defendant intended to kill or to do grievous bodily harm when he struck the deceased in the throat with the knife, you should [find the] defendant guilty of murder, but before you can reach a conclusion on that issue, you will need to consider whether the prosecution has disproved the available defences beyond a reasonable doubt and whether the defendant has established on the balance of probabilities that he was provoked into attacking the deceased."

[89] This is reflected in the first of the powerpoint slides for this part of the summing up, referred to in [80] above. On the very next slide, the following appeared:

> "The complete defence (both to murder and manslaughter) of self-defence is raised on two separate bases – if the prosecution fails to disprove, beyond a reasonable doubt, that, when the defendant killed

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121 AR 382-383. The underlined part is the sentence complained about.
122 AR 383-385.
123 AR 385-386.
124 AR 386-388.
125 AR 388-426.
126 AR 426-433.

> Michael Klaassen, he was acting in self-defence against unprovoked assault under either s 271(1) or s 271(2) of the Criminal Code."[127]

[90] These slides (nine in all) outlined a possible course of deliberations for the jury. The jury were given a hard copy of the slides. The slides posed a number of questions, by way of a suggested question trail. The first question dealt with self-defence, as follows:

> "Has the prosecution satisfied you beyond reasonable doubt of the following in respect of the death of Michael Klaassen:
>
> 1. That the defendant was not acting in self-defence?
>
> a. If 'no' to question 1, the defendant is not guilty of any offence;
>
> b. if 'yes' to question 1, go to question 2".[128]

[91] The issue of intention, to cause death or at least grievous bodily harm, was posed as question 5, after questions addressing the issues of accident and criminal negligence.[129] No complaint was made about this question trail at the trial; nor on this appeal.

[92] The summing up was, necessarily, in the context of a murder trial involving multiple possible defences, lengthy and complex. But I can see no basis to conclude that the three sentences isolated by counsel for the appellant could possibly have misled the jury into thinking the defence of self-defence under s 271(2) did not apply if there was an intention to kill or do grievous bodily harm.

Ground 3 – the directions did not make it clear to the jury that the onus was on the prosecution to disprove beyond reasonable doubt the operation of section 24 of the Criminal Code in relation to self-defence

[93] The appellant submits that the directions given to the jury about the operation of s 24 in relation to self-defence under s 271(1)[130] are ambiguous as to the onus, and the directions about the operation of s 24 in relation to self-defence under s 271(2)[131] do not refer to the onus. He submits there was therefore a real risk that the jury would approach the matter on the basis that the appellant had the onus of establishing the operation of s 24.

[94] In this case, mistake arose in the context of considering one of the limbs under each of s 271(1) and s 271(2). It was not an isolated or independent matter to be considered by the jury, for example in relation to an element of an offence.

[95] The learned trial judge made it very clear, and the jury could have been in no doubt, that the prosecution bore the onus of disproving self-defence; that the defendant did not have to prove anything.

[96] The relevant part of the summing up includes the following:

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127 AR 856.
128 AR 859.
129 AR 859-862.
130 Referring to AR 378.
131 Referring to AR 380.

"The first issue to consider is whether the Prosecution has established beyond a reasonable doubt that the killing of Mr Klaassen did not occur in self defence. …

If the Prosecution cannot, to your satisfaction, beyond reasonable doubt exclude the possibility that Mr Klaassen's injuries occurred in self defence as the law defines it, that is the end of the case. The defendant's use of force would be lawful and you should find him not guilty. …

… I'll deal, first, with section 271, subsection (1). And I've given you on subsequent slides the sections dealing with provocation, mistake of fact and assault, some of which will assist you in respect of some of the concepts here. …

The first matter that arises under [s 271(1)] is whether Mr Carlton was unlawfully assaulted by Mr Klaassen. If you conclude that Mr Klaassen did not assault the defendant unlawfully, this defence is not open.

The Defence case is that you should conclude that Mr Klaassen was assaulting Mr Carlton unlawfully because he came at him with a knife, lunging at him, on [MK's] evidence, and stabbing Mr Carlton's little finger, on his evidence. If Mr Klaassen did come at the defendant wielding a knife as the defendant described, that would be an unlawful assault. There's no question of that being lawful on Mr Klaassen's part, and there's no need for there to be actual contact with the defendant's person by the knife or anything else. For there to be an assault, it is enough if there was a threat of such contact.

You have the defendant's evidence of what happened to consider here. You have the injury to his finger to consider and [MK's] evidence. At the end of the day, it's a matter for you to determine whether you are satisfied that Mr Klaassen did assault the defendant that night, or not. The Prosecution bears the onus beyond reasonable doubt of proving that there was no assault by him on the defendant. The Prosecution accepts that it is open for you to find that Mr Klaassen lunged at the defendant and therefore assaulted the defendant.

…

The next question is if Mr Klaassen assaulted Mr Carlton, whether Mr Carlton provoked any assault by Mr Klaassen. … The defendant does not say there was any provocation by him, and the Prosecution accepts that it is open for you to find that there was no evidence that he provoked Mr Klaassen. Mr Carlton says that it was an unprovoked assault by Mr Klaassen and that, on his evidence, there was no act on his part before the assault by Mr Klaassen with the knife, which could be provocation.

His evidence was that they had gone for a drive to talk about issues that they had with Mr Klaassen, like adults. They got out of the car at Koala Park. He knew that Mr Klaassen had knives strapped to his legs. When they got out of the car, a knife dropped from Mr

Klaassen, which Mr Carlton picked up, only for him to be attacked by Mr Klaassen with another knife, which cut his little finger. Once again, it is the Prosecution who bears the onus here and Ms Merrin concedes that the Prosecution has not proved that any assault by Mr Klaassen was provoked by Mr Carlton's conduct.

The next way the Prosecution seeks to exclude the defence is this. It argues that the force the defendant used was not reasonably necessary to make effectual defence against that assault, so you will have to consider whether Mr Carlton used such force to Mr Klaassen as was reasonably necessary to make effectual defence.

The Prosecution case, on this issue, is that the use of the knife to the throat was conduct that was more than was reasonably necessary in response to the wound to Mr Carlton's little finger of which he spoke. Mr Kimmins' [counsel for the defence] argument was that the force used was reasonably necessary, having regard to the fact that Mr Klaassen was armed with a knife and, also, because Mr Carlton had forgotten that he had a knife in his hand. In that context, he relied on section 24 of our Criminal Code which provides:

> *A person who does or omits to do an act under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.*

He submits that his client honestly believed that he was then using his fist, having forgotten that there was a knife in his hand, so that he honestly and reasonably but mistakenly believed that he was simply punching Mr Klaassen rather than taking a knife to his throat, so he argues he was not criminally responsible to any greater extent than if he had punched Mr Klaassen without the knife. Ms Merrin's [counsel for the prosecution] argument was that you would not accept that alleged mistaken belief. You would conclude that he knew he had a knife in his hand, and that the force he used was more than was reasonably necessary.

It's a matter for you whether you accept that the Prosecution has established that the force he used was more than was reasonably necessary, or that Mr Carlton had no such belief about using his fist without the knife being in it. …

The final matter is whether the force the defendant used was not intended and was not such as was likely to cause death or grievous bodily harm. Grievous bodily harm, I repeat, means any bodily injury of such a nature that, if left untreated, it would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health. I had intended to put that definition – yes. It's on the slide dealing with the elements of the offence of murder if you need to refer to it in writing.

The fact that the force used did cause death or grievous bodily harm is not the point. The question is whether it was likely to happen in

> all the circumstances. There remains a question of whether the Prosecution has satisfied you that the defendant intended to kill the complainant or to do him grievous bodily harm.
>
> So if the Prosecution satisfies you beyond reasonable doubt of these four issues – on this slide – first, that the defendant was not unlawfully assaulted by Mr Klaassen; or, secondly, that the defendant gave provocation to Mr Klaassen for the assault; or, thirdly, that the force used was more than was reasonably necessary to make effectual defence; or, fourthly, that the force used was either intended or was likely to cause death or grievous bodily harm, then the Prosecution has proved that the defence, pursuant to section 271(1), does not apply.
>
> Remember, there's no burden on the defendant to satisfy you that he was acting in self defence. The Prosecution must satisfy you beyond reasonable doubt that he was not. …"[132]

[97] Pausing there, in my view, having regard to the underlined parts of the passage set out above, there is no basis to conclude that the jury could have been under the impression that the appellant bore the onus of proving anything in relation to self-defence under s 271(1), including mistake.

[98] The learned trial judge then turned to deal with self-defence under s 271(2). His Honour began by referring to the terms of the section, and then reiterated that the first two matters for the jury to consider were whether the appellant was unlawfully assaulted by Mr Klaassen and, if so, whether the appellant provoked that assault, reminding the jury of the prosecution's concession that they could be satisfied of the former, and as to the latter could conclude there was no provocation by the appellant. His Honour then said:

> "If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm and the person using force by way of defence believes on reasonable grounds that he cannot otherwise preserve himself from death or grievous bodily harm, it is then lawful for the person to use such force as is necessary for defence, even though such force may cause death or grievous bodily harm. I am repeating there the section – the subsection and, as I've said, grievous bodily harm is defined on one of the slides.
>
> The critical question under this subsection is whether the defendant believed on reasonable grounds that the force used was necessary for defence. The important issue is the state of mind or belief of the defendant. The question is whether the Prosecution has proved beyond reasonable doubt that the defendant did not actually believe on reasonable grounds that it was necessary to do what the defendant did to save himself from death or grievous bodily harm. The defendant does not have to prove that his response was reasonable. The Prosecution must satisfy you that the defendant did not actually believe on reasonable grounds that he had to do what he did to save himself from being killed or from a very serious injury.

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132 AR 376-379. Underlining added.

The Prosecution's submission is that there is no evidence that the defendant did actually believe on reasonable grounds that he had to act as he did to preserve himself from death or grievous bodily harm and that you should not find that. This is a matter for you to consider and, again, much will depend on the view you take of the facts. In this context, Ms Merrin reminded you that his statements to police in his interview were that he was not then feeling nervous or angry and did not think he was defending himself for his life. He said it happened so fast, and Mr Klaassen got him by surprise. The only reason he punched him being because of the sharp pain to his pinkie.

The Prosecution also relies on the evidence as to the degree of force necessary to cut the throat, and the number of stabbing wounds on top of that, and says that the force used was so great and so sustained that you would not find the defendant believed on reasonable grounds that it was necessary. That's a matter for you to consider.

The defendant refers to what he told police in his last interview, on the 15th of September 2013, that Mr Klaassen came towards him with that much hostility, "I'm not about to give nothing to nobody, you know what I mean" and that's at page 25, lines 33 to 36 as evidence of his state of mind, coupled with the evidence that Mr Klaassen was armed with a knife, which he used to cut Mr Carlton, from which you could infer that he had such a belief.

Mr Kimmins also argued that, even if Mr Carlton was mistaken in his belief, that he had to act as he did to preserve himself from death or grievous bodily harm, his belief was honest and reasonable in the circumstances where he thought he did not have the knife in his hand, so that again he could rely on section 24, which is on your slides, to make him not criminally responsible for the act to any greater extent than if the real state of things had been such as he believed to exist.

You will need to assess, looking at all the circumstances of the case, the level of any physical menace which you think that Mr Klaassen was actually presenting before the serious force was used by Mr Carlton. Remember that a person defending himself cannot be expected to weigh precisely the amount of defensive action which may be necessary: intuitive reaction and quick judgment may be essential. And you should not judge the actions of the defendant as if he had the benefit of safety and leisurely consideration.

Then, again, on the next slide I've set out for you <u>what the Prosecution needs to satisfy you beyond reasonable doubt about</u>. First, that the defendant was not unlawfully assaulted by Mr Klaassen; or, secondly, the defendant gave provocation to Mr Klaassen for the assault; or, thirdly, the nature of the assault by Mr Klaassen was not such as to cause reasonable apprehension of death or grievous bodily harm; or, fourthly, the defendant did not actually believe on reasonable grounds that he could not otherwise save himself from death or grievous bodily harm. And if the Prosecution

> satisfies you of any one of those four matters, then the defence is excluded.
>
> Remember, there's no burden on the defendant to satisfy you that he was acting in self defence. The Prosecution must satisfy you beyond reasonable doubt that he was not."[133]

[99] Again, in my view, it is not open to conclude that the jury could have been left, after listening to this part of the summing up, with the impression that the appellant bore the onus of establishing mistake. It was made clear to them that the onus of disproving self-defence rested at all times with the prosecution. The question of mistake was one factor, to be taken into account in considering one of the elements of self-defence – which the jury were reminded, more than once, was for the prosecution to exclude beyond reasonable doubt; rather than a matter the defendant had any burden to prove.

[100] In addition to these specific directions, the jury also had the benefit of the usual general directions, including the direction that "[t]he burden rests on the prosecution to prove the guilt of the defendant. There is no burden here on the defendant to establish any fact, let alone his innocence…"[134] and the direction given where a defendant does not give evidence, which again reinforces the burden of proof on the prosecution.[135] That the onus was on the prosecution to disprove the defence of self-defence, beyond reasonable doubt, was also reinforced in the powerpoint slides shown to and given in hard copy to the jury.[136]

[101] The legal representatives were given the opportunity to consider both a draft of the learned trial judge's summing up, and the powerpoint slides (including the question trail). No issue was raised about his Honour's treatment of the directions about self-defence, including as to the operation of mistake. No redirections were sought after the conclusion of the summing up.

[102] There is no merit to ground 3.

Ground 4 – that the learned trial judge misdirected the jury on the use they could make of post-offence conduct by the appellant

[103] The appellant contends that the directions given to the jury about the appellant's post-offence conduct[137] were confusing as to precisely how such conduct could be used and, further, did not indicate to the jury that unless they rejected the factual possibility that the explanation for the conduct was that the appellant wanted to destroy evidence that he had unintentionally killed Mr Klaassen, the conduct could not be indicative of guilt of murder.

[104] The relevant part of the summing up (which follows a direction about lies told to police going only to credibility, and a lie which may show a consciousness of guilt of unlawful killing, about which no complaint is made[138]) is as follows:

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133 AR 379-381. Underlining added.
134 AR 363; and the slide at AR 820.
135 AR 366; and the slide at AR 824.
136 For example, AR 842, 843, 855, 856 and 859.
137 Referring to AR 368.20 to 369.12 and 386.20 to .30.
138 AR 367.15 to 368.18.

"The prosecution also asks you to have regard to the fact that the defendant disposed of Mr Klaassen's body by first hiding and then burning and burying it in a concealed place, having bought material at Bunnings to assist him to do that, disposed of the clothes he was wearing during the incident, and attempted to dispose of the weapons. There's also the evidence that he instructed [MK] not to say anything; laid a false trail some days later with a text message to Sophia Fay; warned her against speaking to police;[139] asked whether she had seen Mr Klaassen and attempted to raise a false alibi with the pictures on the Facebook page posted on the 29th of July.

However, before you could use that as indicative of guilt you would first have to find that the defendant behaved like that because he knew he was guilty of the offence of unlawful killing, not for any other reason. You must remember that people do not always act rationally and that conduct of this sort can often be explained in other ways, as I've said, for example, as the result of panic, fear or other reasons, having nothing to do with the offence charged. You must have regard to what has been said to you by the defendant and his counsel as to other explanations for his behaviour.

You will remember that he said to police interviewing him that:

> *My biggest worry was they would have – no one would have believed me if they even looked at it, that he's done anything to provoke me, you know what I mean, as I said to you?*

And Sergeant Bosgra says, "Yeah." And Mr Carlton goes on:

> *Within my mind because of my tattoos I couldn't comprehend that anyone would even stand on my side.*

That came from exhibit 17, the transcript marked E, one of the interviews on the 13th. All of these matters must be considered by you in deciding whether you can safely draw any inference from the fact of his departure. Moreover, before – from the fact of this behaviour. Moreover, before the evidence of the defendant's conduct can assist the prosecution you would have to find, not only that it was motivated by a consciousness of guilt on his part, but also that what was in his mind was guilt of the offence charged, not some other misconduct.

If, and only if, you reach the conclusion that there's no other explanation for his behaviour, such as panic or fear of wrongful accusation, are you entitled to use that finding as a circumstance pointing to the guilt of the defendant, to be considered with all of the other evidence in the case. Standing by itself it could not prove guilt."[140]

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139 For completeness, I note that Sophia Fay did not give evidence that the appellant warned her against speaking to police; there was evidence that the appellant told MK not to speak to police. Nothing was made of this on the appeal; nor should it have been. It is a minor and inconsequential conflation of the evidence of MK and Sophia Fay; which I note was not repeated when summarising the prosecutor's address (at AR 429.15).

140 AR 368.20 to 369.12. Underlining added.

[105] Later in the summing up, in the context of directing the jury about the element of intention (to kill or cause grievous bodily harm), the learned trial judge also said this:

> "Intention may be inferred or deduced from the circumstances in which the attack on Mr Klaassen took place and from the conduct of the defendant before, at the time of or after the attack, and of course whatever a person has said about his intention may be looked at for the purpose of deciding what that intention was at the relevant time. The Prosecution also argues that the nature and number of wounds are also evidence that Mr Carlton possessed the necessary intention at the time. There's evidence that the defendant slashed Mr Klaassen's throat with a knife causing the wound that Dr Milne said was the cause of death. It seems unlikely that he would've died from the other wounds he inflicted at that time.
>
> Mr Carlton told police of what was influencing him when he delivered the blow to Mr Klaassen's throat with the knife. He said it was a nervous reaction where he forgot he had the knife in his hand. He explained his first reaction to Detective Sergeant Bosgra by saying:
>
> > *It was just a nervous sort of reaction. You know what I mean. Like I had it in my hand and I proceeded to use it, but it was more of a – at first I swung a punch but I forgot I had that knife in my hand.*
>
> That, and other similar evidence he gave, suggests that he did not intend to kill or do grievous bodily harm at the time, but rather that he intended to punch Mr Klaassen. As against that, you have the evidence of [MK] of what he observed at the scene and the evidence of Dr Milne questioning the likelihood of the injury being inflicted in the way described by the defendant.
>
> Ms Merrin also relies on the manner in which Mr Klaassen's body was disposed of as demonstrating an apprehension on the part of Mr Carlton that, if it were to be found, it would be evident from the wounds that he had been killed with the necessary intent.
>
> You will recall what I said about the care with which you should assess that post-offence conduct – before you could use it as indicative of guilt, you would first have to find that the defendant behaved like that because he knew he was guilty of the offence charged of murder, not for any other reason. Are you satisfied beyond reasonable doubt that the defendant meant to cut the deceased's neck? If you are, then it's open to you to find that Mr Carlton intended to cause Mr Klaassen's death or to cause him grievous bodily harm, and, if that is what has caused his death, to find him guilty of murder. Dr Milne said the cause of death was the incised wound to the neck. If you accept that evidence and find that Mr Carlton hit Mr Klaassen with the knife intending to cause his death or to cause him grievous bodily harm, it would be open to

> conclude – open to you to conclude that Mr Carlton murdered him subject to what I'm about to say about provocation."[141]

[106] In considering this ground it is important to keep in mind that there was no issue at the trial that the appellant killed Mr Klaassen.[142] The issues were whether he held the requisite intention at the time he did so; and whether it was unlawful (on the basis it was not excused by self-defence, accident or provocation).

[107] The content of the direction required to be given in relation to post-offence conduct will depend on the nature of the conduct, and the issues in dispute in the particular case[143] – which directs attention to the element(s) of the relevant offence which are in issue. As Williams JA (with whom Keane JA, as his Honour then was, and Mullins J agreed) said in *R v Mitchell* [2008] 2 Qd R 142; [2007] QCA 267 at [26]:

> "In both *Edwards* and *Zoneff* the expression was used that the lie might implicate the accused in the 'offence with which he is charged'. Those words were apt in the factual circumstances then under consideration; essentially there was no alternative charge. But there is a complication where, as here, the offence charged is murder but there is the lesser offence of manslaughter available. In consequence it is of critical importance to identify what is in issue at the trial and what precise admission is established by the lie. If the accused admits doing the act which occasioned the death, the relevant consciousness of guilt must be to the offence of murder rather than manslaughter. Where the accused denies causing the death (say, for example, by giving evidence he was not at the scene) consciousness of guilt could be relevant to two elements of the offence. The lie could in the circumstances be relied on by the jury as an admission that the accused did the act which caused death. That would, at least, establish the offence of manslaughter. But it may be that, given all of the evidence in the case, the lies told by the accused could also amount to an admission of guilt to murder. What is important in that latter situation is that the summing up draw to the attention of the jury the fact that there are two elements involved and that the jury would have to be satisfied that the lie constituted an admission of each element before a verdict of guilty of murder could be returned."[144]

[108] In the same vein, in *R v Ali* [2001] QCA 331 at [43], a passage referred to with approval by Keane JA in *R v Mitchell* at [49], Thomas JA (McMurdo P and Davies JA agreeing) said:

> "… The term 'consciousness of guilt' or 'realisation of guilt and a fear of the truth' (*Edwards v The Queen* above at 211) remains an accepted rationale for a direction on this topic, although some of the problems associated with it have been recognised (*Zoneff v The Queen* (2000) 200 CLR 234, 244 at para 15). The problem that has

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141 AR 385-386. Underlining added.

142 Cf *R v Trebeck* [2018] QCA 183, in which a major issue for the jury to deal with was whether the appellant was the person who had killed the deceased.

143 *R v Baden-Clay* (2016) 258 CLR 308 at [74], referring to *R v White* [1998] 2 SCR 72 (a decision of the Supreme Court of Canada) at [32] per Major J.

144 Underlining added.

> been raised arises when several offences have been committed and the lie is equally explicable by consciousness of guilt of the lesser offence. Usually in such a case it is necessary that this possibility be pointed out to the jury, and in each of *R v May*, *R v M* and *R v R* it was held that the failure to do so amounted to an error.[145] However I do not think that it is always necessary to direct that a lie may be used only to support guilt upon the least of the options available. Obviously each case must depend upon its own facts and circumstances. In the present case I think it was proper to leave the interpretation of these lies open to the jury as capable of supporting guilt on the appellant's part on all or any of these offences."

[109] The rationale behind the need to direct the jury about alternative explanations for the lie or other conduct is important to keep in mind. That is identified in the following passage from the judgment of Gibbs J in *R v May* [1962] Qd R 456 at 462-463, referred to by Keane JA in *R v Mitchell* at [44]. Speaking of the relevance of a false denial in a case involving a charge of rape, Gibbs J said:

> "… The explanation for his false denials may have been his wish to conceal his participation in an indecent assault upon the complainant rather than to disguise the commission of a rape. This however seems to me to go to the <u>weight of the evidence</u>, rather than to the question whether it is legally corroborative. The denial if accepted to be false, is confirmatory of the evidence of the complainant that she was taken to Lota Creek for an unlawful purpose, and it was not wrong for the trial judge to direct the jury that it could be treated as corroborative.
>
> However, for the reasons I have given, I consider that the weight of the evidence of the false denial, as corroboration of the complainant's evidence that she was raped, was very slight. In the exercise of his discretion the learned trial judge might well have decided that he would not direct the jury that this evidence could be treated as corroborative, but, since he left it to them, 'it was highly necessary <u>to warn them against pressing the matter too far</u>'. (*R v O'Brien (No 1)* [1931] St R Qd 158 at pp 163-4.) They should have been warned that, although its weight was for them, they should recognise the dangers of <u>placing too much reliance on it</u> in relation to the charge of rape, and that, <u>since the false denial might have been made because the appellant feared that he might be implicated in an offence less serious than rape</u>, they should consider it with caution before they treated it as corroborative of the evidence that rape had occurred."[146]

[110] Recently, in *R v Reid* [2018] QCA 63 Sofronoff P observed, at [81], that:

> "Much confusion about the significance of evidence of post-offence conduct by an accused can arise by restricting one's consideration of

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145 The relevant citations for these cases are: *R v May* [1962] Qd R 456; *R v M* [1995] 1 Qd R 213 and *R v R* [2001] QCA 121. Each of these cases involved charges of rape, as well as a lesser sexual offence. See *R v Ali* at [41].

146 Underlining added.

the issue to the broad question whether or not the evidence unequivocally 'demonstrates consciousness of guilt of the *charged offence*'."

[111] As his Honour also said, at [82] and [83], in some cases no more narrow a distinction need be drawn:

> "[83] However, evidence of post-offence conduct is often led to prove a single fact in issue rather than the commission of a distinct crime consisting of several elements. This is so because after committing a crime a guilty person is not usually conscious, for example, of having committed an offence against s 302 of the *Criminal Code* as distinct from an offence against s 303 of the *Criminal Code* and does not then set about to behave accordingly. Rather, such a person is conscious that he or she has, for example, stabbed the deceased intending to kill and has succeeded in so doing. The guilty acts are the stabbing, the ensuing death and the killer's consciousness of having done so intending to kill. Consequently, evidence of post-offence conduct may be led to prove one or more, or all, of those facts. Whether the conduct is particularly relevant to one such fact or element may depend upon the weight of proof of each element that must be established as well as upon the forensic choices made by the parties about the elements and facts that they wish to put in issue."

[112] His Honour further said, at [92] and [93]:

> "[92] It is… a mistake to focus attention upon 'the crime charged' rather than upon the relevant behaviour of the person accused of that crime and what that behaviour may say about the fact it is led to prove. Sometimes it is led to prove only the accused's complicity in an offence. Sometimes the accused's involvement is admitted but an element of the offence is in issue and it is that factual element alone which is said to be proved, by inference, from the accused's actions after the offence had been committed.
>
> [93] Consequently, when considering evidence of post-offence conduct as proof of guilt, whether by proof of statements or other acts, it is essential first to identify the fact sought to be proved by that evidence. The significance of the evidence, and its weight, will vary according to the relationship of the post-offence conduct to the fact sought to be proved by proof of that conduct."

[113] In *R v Baden Clay* the issues to be proved, in part, by post-offence conduct and lies were whether it was the accused who killed his wife *and* whether he had done so intentionally. At [73]-[76] the High Court said:

> "[73] In *R v White*,[147] in the Supreme Court of Canada, Major J said:

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147 [1998] 2 SCR 72 at 89 [27].

> 'As a general rule it will be for the jury to decide, on the basis of the evidence as a whole, whether the post-offence conduct of the accused is related to the crime before them rather than to some other culpable act. It is also within the province of the jury to consider how much weight, if any, such evidence should be accorded in the final determination of guilt or innocence. For the trial judge to interfere in that process will in most cases constitute a usurpation of the jury's exclusive fact-finding role.'

[74] In *R v White*, Major J went on to say that there may be cases where post-offence conduct, such as the accused's flight or concealment, is so out of proportion to the level of culpability involved in a lesser offence that it might be found by the jury to be more consistent with the more serious offence charged.[148] There may be cases where an accused goes to such lengths to conceal the death or to distance himself or herself from it as to provide a basis on which the jury might conclude that the accused had committed an extremely serious crime and so warrant a conclusion beyond reasonable doubt as to the responsibility of the accused for the death and the concurrent existence in the accused of the intent necessary for murder.[149] There is no hard and fast rule that evidence of post-offence concealment and lies is always intractably neutral as between murder and manslaughter. As Major J said:[150] 'The result will always turn on the nature of the evidence in question and its relevance to the real issue in dispute'.

[75] In *Lane v The Queen*,[151] the Court of Criminal Appeal of the Supreme Court of New South Wales rejected the contention that a count of manslaughter of the accused's child should have been left to the jury as an alternative to murder. The Court held that the jury were entitled to take the post-offence conduct of the accused as evidencing consciousness of guilt of murder. In particular, the Court held that the lies told by the accused 'alone were sufficient to provide the evidentiary foundation for an inference that … she acted with the intention of killing'.[152] Their Honours went on to say that the false accounts given by the accused 'provide no factual foundation for an inference that the manner in which she killed [her child]' would establish manslaughter by criminal negligence.[153]

[76] It was open to the jury, in this case, to regard the lengths to which the respondent went to conceal his wife's body and to conceal his part in her demise as beyond what was likely, as

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148 [1998] 2 SCR 72 at 91 [32].
149 *R v Ciantar* (2006) 16 VR 26 at 39 [38]-[40], 47 [65]-[67]; *R v Dan* [2007] QCA 66 at [89], [99].
150 [1998] 2 SCR 72 at [32].
151 (2013) 241 A Crim R 321.
152 (2013) 241 A Crim R 321 at 349 [111].
153 (2013) 241 A Crim R 321 at 349 [111].

> a matter of human experience, to have been engendered by a consciousness of having unintentionally killed his wife."

[114] The post-offence conduct in this case included the Facebook photos taken on the night Mr Klaassen was killed, as one witness put it, "to cover up and make out that no one ever left"; the text message the appellant sent to Sophie the day after he was killed, purporting to be from Mr Klaassen, saying that he was okay and was going to the Aspley caravan park; a week later, the appellant and his girlfriend going to Sophie's place to ask if she has seen or heard from Mr Klaassen; the appellant telephoning MK about two weeks later, telling him not to say anything, "it's all been sorted"; and the steps taken by the appellant to dispose of Mr Klaassen's body. Those steps involved, initially, throwing his body over a fence and hiding it in the bush in the place where he was killed; the following day, going to Bunnings and buying a tarpaulin, heat beads and hydrochloric acid; returning to the scene of the killing, binding Mr Klaassen's body in the tarp with duct tape and putting it in the landcruiser car; driving to the Chambers Flat Road property; digging a hole to hip depth to put the body in; burning the body in the hole, using paint thinner to start the fire; then filling the hole in, and covering the surface of the ground with chlorine or pool acid; and attempting to destroy the knives in a nearby fire pit, as well as the appellant's clothes.

[115] As already mentioned, it was not in issue at the trial that the appellant had killed Mr Klaassen. The real issues in dispute were whether the appellant killed Mr Klaassen intentionally; and, if so, whether the killing was unlawful, relevantly because it was not justified or excused as self-defence, accident or the result of provocation.

[116] The primary factual element which the prosecution contended was proved, by inference, from the appellant's actions after the offence, was *intention* – as an element of the offence charged, murder; but also as negativing the hypothesis that the killing occurred in self-defence, by accident or as a result of provocation. The learned trial judge made it clear, in the directions, that the jury must be satisfied the conduct was motivated by a consciousness of guilt of the offence charged – which was murder – not some other misconduct; and, later, that the jury must be satisfied the defendant behaved in the way he did because he knew he was guilty of the offence charged of murder, not for any other reason.

[117] Although no express reference was made to the alternative, manslaughter, in the particular circumstances of this case, having regard to the precise issues in dispute, and the nature of the conduct, that did not render the direction insufficient.[154] This was not a case in which it was necessary to warn the jury against "pressing the matter too far".

[118] The post-offence conduct was not the only evidence from which the jury were invited to infer the appellant killed Mr Klaassen with the requisite intention, and to reject the hypotheses of self-defence, accident or provocation. They were also invited to do so from the manner in which Mr Klaassen was killed, and the cause of his death – a substantial cut with a knife to his throat severing his carotid artery and jugular vein; the additional 18 stab wounds inflicted on Mr Klaassen by the appellant, and the circumstances in which that occurred; evidence of motive; and

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[154] See, by analogy, *R v Box and Martin* [2001] QCA 272 at [8] per McMurdo P and at [53] per Dutney J.

the appellant's lies when first interviewed by police. But in so far as the post-offence conduct was concerned, it was open to the jury in this case to consider that conduct to be completely out of proportion to the level of culpability involved in an unintentional or accidental killing.

[119] The direction about how the jury could use the post-offence conduct did not foreclose the jury's consideration of matters such as whether the killing occurred in self-defence or by accident, as the result of criminal negligence or as the result of provocation. Relevantly, the first direction about how the jury could deal with the evidence of post-offence conduct was given in the first of four parts of the summing up, which was described by the learned trial judge as the section dealing with "assessing the evidence". That was followed by the second part, which dealt at length with the elements of the offence of murder, self-defence, accident, intention and provocation. It was in the context of the specific directions as to intention that the further direction about post-offence conduct was given. The third and fourth parts of the summing up comprised a summary of the evidence, and a summary of prosecution and defence arguments, respectively.

[120] It is clear that, in the particular context in which the post-offence conduct directions were given, the specific factual element concerned was intention. In that context, in my view, the directions were sufficient, would not have caused the jury any confusion as to how they could use the evidence of post-offence conduct, would not have resulted in a process of impermissible reasoning and did not deprive the appellant of the possibility of an acquittal.

[121] For these reasons, ground 4 also fails.

[122] Finally, I note again that at trial submissions were invited on the content of the summing up prior to it being delivered; and no redirections in relation to this aspect of it were sought.[155] As McMurdo JA observed in *R v Murray* [2016] QCA 342 at [36], this would not prevent appellate intervention, where it is shown there has been a miscarriage of justice. However, it is a relevant consideration where, as here, the appellant was represented at the trial by experienced counsel and the learned trial judge has provided the parties with the opportunity to have input into the content of the directions to be given in relation to important issues arising in the trial. It is consistent with the efficiency and fairness of the criminal justice process, both at first instance and on appeals, that due regard be paid to the position taken by the legal representatives for the parties at the trial in relation to the content of the summing up, just as it is in relation to forensic and strategic decisions otherwise.[156]

Proposed order

[123] It follows that, in my view, the appeal against conviction ought to be dismissed.

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155 Cf AR 436-440.

156 *Nudd v The Queen* (2006) 225 ALR 161 at [9] per Gleeson CJ.